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No. 88-702

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARY JOYCE KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in excluding, as irrelevant, proffered expert testimony that petitioner was highly gullible and therefore unlikely to know that a package she received from an accomplice contained cocaine.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Brown v. *Trigg*, 791 F.2d 598 (7th Cir. 1986)	6
Hamling v. *United States*, 418 U.S. 87 (1974)	4
Taylor v. *Illinois*, No. 86-5963 (Jan. 25, 1988)	5
United States v. *Buchbinder*, 796 F.2d 910 (7th Cir. 1986)	5
United States v. *Esch*, 832 F.2d 531 (10th Cir. 1987), cert. denied, No. 87-6280 (Feb. 29, 1988)	6, 7
United States v. *Kepreos*, 759 F.2d 961 (1st Cir.), cert. denied, 474 U.S. 901 (1985)	7
United States v. *Lewis*, 837 F.2d at 415 (9th Cir. 1988)	6, 7
United States v. *McBride*, 786 F.2d 45 (2d Cir. 1986)	7
United States v. *McLernon*, 746 F.2d 1098 (6th Cir. 1984)	5
United States v. *Medina-Gasca*, 739 F.2d 1451 (9th Cir. 1984)	5
United States v. *Nobles*, 422 U.S. 225 (1975)	5
United States v. *Roark*, 753 F.2d 991 (11th Cir. 1985)	7, 8
United States v. *White*, 766 F.2d 22 (1st Cir. 1985)	6

Statutes and rules:

18 U.S.C. (Supp. IV) 17(c)	6
21 U.S.C. 841(a)(1)	1
21 U.S.C. 952(a)	1
Fed. R. Crim. P.:	
Rule 12.2(b)	4
Rule 12.2(d)	5
Rule 16(b)(1)(B)	4, 5
Rule 16(d)(2)	5
Fed. R. Evid. 704(b)	5

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1-2) is reported at 858 F.2d 744 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1988. The petition for a writ of certiorari was filed on October 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1954(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of importing cocaine (Count 1) and possessing cocaine with intent to distribute it (Count 2), in violation of 21 U.S.C. 841(a)(1) and 952(a). She was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed without opinion (Pet. App. 1).

1. The pertinent facts are summarized in the government's brief in the court of appeals (Gov't C.A. Br. 2-7). Late on the evening of January 30, 1987, petitioner entered the Customs area of the Port of Miami terminal after a one-day "Sea Escape" cruise that had stopped in the Bahamas. A Customs inspector noted that petitioner gave suspicious, unresponsive answers to routine re-entry questions, that her dress and actions were unlike those of other returning passengers, and that she wore a loose skirt typical of the kind favored by drug smugglers. Although she at first refused, petitioner finally agreed to submit to a body frisk by a female inspector. The frisk revealed the presence of several pliable, taped packages located between petitioner's legs and secured by a girdle.

Petitioner displayed no change of demeanor when the packages were opened, revealing the presence of a white powder. Subsequent chemical analysis showed that the packages contained approximately one kilogram of cocaine. Petitioner admitted after her arrest that she "knew it was wrong," but that she "needed the money" because she "couldn't even pay [her] light bill."

2. Testifying in her own defense, petitioner stated that a jeweler named Fritz Russell, who was a friend of her sister, had asked her to travel on a one-day cruise to the Bahamas to pick up gold chips and bring them back. Petitioner testified that she had not intended to smuggle anything but had just planned to return with Russell's gold. While she was aboard the boat during its port call in the Bahamas, petitioner stated, two strangers gave her packages wrapped in duct tape for Russell. Because she had previously seen gold wrapped in similar packages, petitioner testified that he believed the packages given to her contained gold chips. She further testified that the men in the Bahamas told her that the duty she would be charged if she declared the gold on re-entry into this

country would be $1,000, which she did not have. Petitioner stated that the strangers then suggested that she smuggle the packages in her underwear. Prior to that time, petitioner stated, she did not know that she was going to have to bring the gold back surreptitiously.

To support her theory of defense, petitioner proffered—for the first time at trial—the testimony of Dr. Barry Crown, a psychologist. Defense counsel stated that Dr. Crown's testimony was offered to show "the level of [petitioner's] susceptibility to suggestion" (Gov't C.A. Br. 5). In a proffer made outside the presence of the jury, Dr. Crown stated, based on his interview and testing of petitioner, that petitioner functioned at the intellectual level of an eleven year old, but that she had compensated for that disability by developing other skills. Dr. Crown added that petitioner was susceptible to being led into going to the Bahamas to pick up gold.

Under questioning by the district court, Dr. Crown admitted that petitioner's state of mind did not impair her ability to do an act knowingly and voluntarily, and that she was capable of doing an act willfully, with the specific intent to do it. Dr. Crown also disclosed, contrary to petitioner's trial testimony, that petitioner had told him that she knew prior to boarding the boat for the Bahamas that she was going to smuggle gold into the United States without declaring it. In view of that testimony, the court stated that it "did [petitioner] a favor" in adducing the proffered testimony outside of the jury's presence and suggested that the defense might wish to withdraw the witness. Defense counsel nonetheless sought to introduce the expert's testimony.

3. The district court excluded the proffered testimony for two reasons. First, as a procedural matter, the court found that the midtrial proffer of Dr. Crown's testimony violated the standing discovery order that required the

pretrial production of the results of any mental examination or scientific test. Second, the court found Dr. Crown's opinion to be irrelevant because, as Dr. Crown stated, it dealt with petitioner's susceptibility to being induced to go to the Bahamas to bring back gold illegally, while the sole issue at trial was whether she knew she was carrying cocaine in her underwear. The court also found it significant that Dr. Crown stated that petitioner's mental condition would not affect her capacity to perform an act knowingly, willfully, and with specific intent.

After the court rejected Dr. Crown's testimony, defense counsel argued, for the first time, that Dr. Crown's testimony would help the jury decide whether petitioner's state of mind would permit her knowingly to import cocaine. The court disagreed and adhered to its initial ruling.

ARGUMENT

Petitioner contends that the district court erred in excluding expert psychological testimony that she was highly gullible and susceptible to suggestion. As this Court has recognized, however, a trial judge enjoys broad discretion in deciding whether to admit expert testimony. *Hamling* v. *United States,* 418 U.S. 87, 127 (1974). There was no abuse of that discretion here; the district court acted well within its discretion in excluding Dr. Crown's testimony.

As the district court noted, petitioner's midtrial proffer of Dr. Crown's testimony violated both Fed. R. Crim. P. 12.2(b) and Fed. R. Crim. P. 16(b)(1)(B), which were incorporated into the standing discovery order that applied to this case. Rule 12.2(b) requires that a defendant who "intends to introduce expert testimony relating to * * * any * * * mental condition of the defendant bearing upon the issue of [his] guilt" must notify the prosecutor and the

court in writing of his intention "within the time provided for the filing of pretrial motions." Rule 16(b)(1)(B) similarly requires the production of "any results or reports of * * * mental examinations * * * which the defendant intends to introduce * * * or which were prepared by a witness whom the defendant intends to call." Both Rules 12.2(d) and 16(d)(2) in turn provide that a trial court may exclude the testimony of an expert witness for failure to comply with the notice and production requirements contained in the rules.

In *United States* v. *Nobles,* 422 U.S. 225, 241 (1975), and more recently in *Taylor* v. *Illinois,* No. 86-5963 (Jan. 25, 1988), this Court has upheld orders excluding proffered defense testimony because of a failure to comply with comparable discovery requirements. Other courts have similarly held, in circumstances comparable to those here, that expert psychiatric or psychological testimony proffered by the defense was subject to exclusion because of the failure of defense counsel to comply with applicable notice and discovery requirements. See, *e.g., United States* v. *Buchbinder,* 796 F.2d 910, 913-916 (7th Cir. 1986) (expert testimony that the defendant was extremely depressed); *United States* v. *McLernon,* 746 F.2d 1098, 1114-1115 (6th Cir. 1984) (expert testimony pertinent to an entrapment defense); *United States* v. *Medina-Gasca,* 739 F.2d 1451, 1454 (9th Cir. 1984) (expert testimony regarding a defendant's mental "deficiencies"). Petitioner's failure to comply with the rules requiring notice and production justified the exclusion of Dr. Crown's testimony even if that testimony were otherwise admissible.

Aside from the procedural bar, the district court properly excluded the expert testimony on the subject of gullibility and susceptibility. Rule 704(b) of the Federal Rules of Evidence specifies that "[n]o expert witness testifying with respect to the mental state or condition of a

defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged * * *." Moreover, in enacting 18 U.S.C. (Supp. IV) 17(c), Congress expressly abolished any defense of "diminished capacity," *i.e.*, any defense relating to a defendant's mental condition that falls short of insanity. For that reason, it has been recognized that an expert

> may not substitute her judgment as to the defendant's state of mind by testifying that because of the defendant's personality, she would not have acted in a particular manner. Absent the suggestion of the presence of a mental disease or defect, a trial court may properly exclude psychiatric testimony which merely offers an opinion about the defendant's capacity to form the mental state required to commit the offense charged.

United States v. *Esch*, 832 F.2d 531, 535 (10th Cir. 1987) (citation omitted), cert. denied, No. 87-6280 (Feb. 29, 1988).

Petitioner did not rely on an insanity defense, and the evidence in question was not offered to prove lack of capacity to form specific intent. To the contrary, Dr. Crown testified that petitioner's mental condition did *not* impair her ability to act knowingly and willfully. In such circumstances, the courts of appeals have consistently held that evidence comparable to that proffered here should be excluded as irrelevant and misleading. See *United States* v. *Lewis*, 837 F.2d at 415, 418 (9th Cir. 1988) (expert testimony regarding the effects of the defendant's corporal punishment as a child); *United States* v. *Esch*, 832 F.2d at 534 (expert testimony that the accused had a "dependent personality"); *Brown* v. *Trigg*, 791 F.2d 598, 600-601 (7th Cir. 1986) (expert testimony that the defendant's low I.Q. indicated that he did not act "knowingly"); *United States* v. *White*, 766 F.2d 22, 24-25 (1st Cir. 1985) (expert

testimony regarding the defendant's susceptibility to mother's influence); *United States* v. *Kepreos,* 759 F.2d 961, 964 (1st Cir.), cert. denied, 474 U.S. 901 (1985) (expert testimony regarding the defendant's diminished mental state that hindered his "ability to attend to subtle details").

The decision in this case does not conflict with *United States* v. *McBride,* 786 F.2d 45 (2d Cir. 1986), or *United States* v. *Roark,* 753 F.2d 991 (11th Cir. 1985), as petitioner contends. In *McBride,* a bank larcency prosecution, the defendant sought to present psychiatric testimony to support her contention that she had not formed the requisite guilty knowledge. To that end, the defendant offered the testimony of a psychiatrist that the defendant had suffered "residual organic brain impairment" as a result of beatings inflicted by her husband and that she was "functional but [mentally] impaired" at the time of the offense (786 F.2d at 49). The district court excluded the testimony. The court of appeals reversed, holding that the expert's opinion "as to the psychological implications of [the defendant's] objectively ascertainable organic brain injury would have been of assistance to the jury" in determining the defendant's mental state in light of the "conscious avoidance" theory on which the case was submitted to the jury (*id.* at 50). In so holding, however, the court expressly recognized that "a district court may exclude psychiatric testimony which merely offers an opinion about the defendant's capacity to form the mental state required to commit the offense charged, without suggesting the presence of a mental disease or defect" (*ibid.*). Since there was no indication of "organic impairment" here, *McBride* would not require the admission of the expert testimony that was at issue in this case. See *United States* v. *Lewis,* 837 F.2d at 418 n.6; *United States* v. *Esch,* 832 F.2d at 535.

Similarly, in *Roark* the court held that a psychologist's testimony regarding the defendant's susceptibility to suggestion was erroneously excluded at trial. In *Roark*, however, the proffered testimony dealt with whether the defendant's confession was voluntary, or whether her neurosis, which effectively put her in a hypnotic state during interrogation, affected the voluntariness of her statements to law enforcement officials (753 F.2d at 994). Since the issue of voluntariness was submitted to the jury, the court found that the expert's testimony would have "help[ed] the trier of fact determine whether * * * Roark was somehow psychologically coerced into making the inculpatory statements" (*ibid.*). In reaching that result, the court did not suggest that expert testimony of the kind at issue in this case would be admissible; indeed, the court cautioned that its ruling did not even mean "that this kind of testimony is always admissible in every confession case" (*id.* at 994-995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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